

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PRIMO MARQUEZ)	
Claimant)	
VS.)	
)	Docket No. 1,033,834
METRO TILE CONTRACTORS, INC.)	
Respondent)	
AND)	
)	
BUILDERS' ASSOCIATION SELF-INSURERS')	
FUND OF KANSAS)	
Insurance Fund)	

ORDER

Claimant appealed the October 11, 2007, Supplemental Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

Claimant, who is a union tile setter, alleges he injured his back working for respondent on November 6, 2006; on November 13, 2006; in December 2006; and in January 2007 while moving boxes of tile, mixing concrete and installing granite counter top. Respondent and its insurance fund (respondent) argue they are not responsible for claimant's back injury as it may be the natural consequence of an earlier work injury that claimant sustained while working for a different employer. Respondent also denies claimant's alleged accident arose out of and in the course of his employment and that claimant provided timely notice of the alleged accidental injury.

This claim returns to the Board for a second time. Claimant first appealed a July 2, 2007, Preliminary Decision entered by Judge Foerschler in which the Judge denied claimant's request for medical treatment from Dr. Glenn M. Amundson "for the time being" but stated "[c]urrent palliative treatment is to be continued."¹ Because of the apparent inconsistency it was unclear from the Preliminary Decision whether the Board had jurisdiction to review the Judge's preliminary findings at this juncture of the claim.

¹ ALJ Preliminary Decision (July 2, 2007) at 2.

Consequently, the Board by Order dated September 26, 2007, remanded the claim to the Judge to answer the following five questions:

1. Did claimant suffer personal injury by accident and, if so, on what date or dates?
2. Did claimant's accidents and injuries arise out of and in the course of his employment with respondent?
3. Did claimant provide respondent with timely notice of accident?
4. Is claimant in need of medical treatment for his alleged work-related injuries?
5. Is claimant temporarily and totally disabled as a result of the alleged work-related injuries and, if so, for what period, if any, is temporary total disability due and ordered paid by respondent?

Following the Board's order of remand, Judge Foerschler entered an October 11, 2007, Supplemental Preliminary Decision. After specifically finding "[i]t is more likely than not that the unusual working conditions at the Argosy Hotel on November 6 and November 15, 2006 [while working for respondent] at least aggravated the diseased condition of Mr. Marquez's back and again in December" and that claimant "reported these developments to his supervisor", the Judge denied claimant's request for preliminary hearing benefits. The Judge concluded it was not clear whether the claimant had a valid claim for workers compensation benefits from respondent or that claimant would benefit from the medical treatment he had requested. The October 11, 2007, Supplemental Preliminary Decision concluded as follows:

Under these circumstances it is concluded that it is not yet clear whether the claimant has a valid claim for workers compensation benefits from the employer he chose to involve or that there would be a beneficial result from the medical treatment he has specifically requested. For this reason the relief requested by the preliminary hearing is denied at this time.²

Although the Judge addressed questions one and two from the Board's Order of remand, the answers to the remaining questions are not readily ascertainable from the October 11, 2007, Supplemental Preliminary Decision. Furthermore, the Supplemental Preliminary Decision goes on to contradict the finding on the first two issues.

² ALJ Supplemental Preliminary Decision (Oct. 11, 2007) at 3, 4.

Claimant contends Judge Foerschler failed to comply with the Board's order of remand. Claimant argues the Judge has ignored uncontradicted evidence his accidental injury arose out of and in the course of his employment and that he gave respondent timely notice. Accordingly, claimant requests the Board to grant him temporary total disability benefits and medical benefits, including the outstanding medical expenses related to his low back, designate Dr. John M. Ciccarelli as the authorized physician, and order respondent to provide all reasonable and necessary future medical treatment.

Conversely, respondent contends Judge Foerschler has not decided the questions of whether claimant injured his back working for respondent or whether claimant provided respondent timely notice. Therefore, respondent argues the Board does not have jurisdiction to review those issues on this appeal. In the alternative, respondent argues claimant failed to prove he injured his back in an accident that arose out of and in the course of his employment with respondent and claimant failed to prove he provided respondent with timely notice of the accidental injury. Consequently, respondent requests the Board to deny claimant's request for benefits.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction at this juncture to determine whether claimant injured his back working for respondent or whether he provided respondent with timely notice of the accident or injury? If so, did he?
2. Does the Board have jurisdiction at this juncture to order respondent to pay claimant temporary total disability benefits or provide specific medical treatment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes:

The October 11, 2007, Supplemental Preliminary Decision is a preliminary hearing order entered under K.S.A. 44-534a. The Board's jurisdiction to review the Supplemental Preliminary Decision is limited by that statute, which provides in pertinent part:

A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

. . . .

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.³

In addition, the Workers Compensation Act provides the Board shall not review a preliminary hearing award entered under K.S.A. 44-534a “unless it is alleged that the administrative law judge exceeded the administrative law judge’s jurisdiction in granting or denying the relief requested at the preliminary hearing.”⁴

As indicated above, the Judge concluded the October 11, 2007, Supplemental Preliminary Decision by stating it was not clear that claimant had a valid claim for workers compensation benefits against this particular respondent. In essence, the Judge is saying claimant has failed to satisfy his burden of proving a compensable accident and/or timely notice, which are issues the Board has the authority and jurisdiction to review from a preliminary hearing order. The Board, however, does not have the jurisdiction at this stage of the claim to determine whether claimant meets the definition of being temporarily and totally disabled or whether claimant should receive the specific medical treatment that claimant now requests. Nor does the Board have jurisdiction to address a preliminary hearing finding regarding the payment of past medical expense.⁵

Claimant testified how he experienced different instances where his back gave out or he experienced flare-ups of low back pain. It is not clear at this time whether claimant will pursue these claims as separate and distinct accidents or whether this claim will evolve into one for a series of repetitive mini-traumas during the period claimant last worked for respondent, September 21, 2006, through January 11, 2007. Nonetheless, claimant’s testimony is credible about how his back worsened while working for respondent. Moreover, Dr. John M. Ciccarelli, whom the parties selected to perform an independent medical examination, examined claimant in June 2007 and concluded claimant “did suffer a symptomatic aggravation of his underlying instability as well as possible disc herniation

³ K.S.A. 44-534a(a)(2).

⁴ K.S.A. 2006 Supp. 44-551(i)(2)(A).

⁵ Nonetheless, K.S.A. 44-510j(h) provides “No action shall be filed in any court by a health care provider or other provider of services under this act for the payment of an amount for medical services or materials provided under the workers compensation act and no other action to obtain or attempt to obtain or collect such payment shall be taken by a health care provider or other provider of services under this act, including employing any collection service, until after final adjudication of any claim for compensation for which an application for hearing is filed with the director under K.S.A. 44-534 and amendments thereto.”

secondary to his activities on or around November 2006.”⁶ And claimant’s personal physician, Dr. Dan Murphy, in a February 9, 2007, letter stated he believed the majority of claimant’s present back problems was related to his job as a tile setter.

The undersigned finds claimant injured his back working for respondent as a tile setter as he has alleged. Moreover, the accidental injury arose out of and in the course of his employment with respondent. The evidence also suggests that claimant’s injuries arose as the result of repetitive trauma. But that is not an issue the parties have raised for this appeal.

Claimant’s testimony also establishes that he provided respondent with timely notice of his back injury. Claimant’s testimony establishes that he told his supervisor of his back problem on November 6, 2006, and again on November 13, 2006. And one of claimant’s supervisors, Doug Steward, testified he was aware claimant was experiencing back complaints during the period in question and that he assumed claimant’s back problems were related to his work. Accordingly, the evidence establishes respondent was aware of claimant’s back problems and their relationship to his work as his symptoms flared as early as November 2006. The undersigned finds claimant provided timely notice to respondent of his back injury as required by K.S.A. 44-520.

For preliminary hearing purposes, claimant has established his right to receive benefits under the Workers Compensation Act. Accordingly, the October 11, 2007, Supplemental Preliminary Decision is reversed. Consequently, claimant is entitled to receive any reasonable and necessary medical treatment to cure or relieve claimant from the effects of his low back injury⁷ and temporary total disability benefits, if appropriate. In light of that finding, should claimant and respondent disagree regarding claimant’s entitlement to any of those benefits at this stage of the proceeding, the parties may request another hearing before the Judge.

The legislature intended preliminary hearings to be summary in nature to afford injured workers both prompt medical treatment and prompt payments of disability compensation. The legislature recognized that many issues could be resolved *not* at the preliminary hearing stage of the claim, when the need of medical treatment and disability compensation might be critical, but later at the regular hearing stage when the evidence was more fully developed and thereby avoiding unnecessary delays for injured workers to

⁶ Ciccarelli Report (filed June 25, 2007) at 7.

⁷ K.S.A. 2006 Supp. 44-510h.

receive benefits. Consequently, the legislature developed a procedure for employers and their insurance carriers to recover benefits that should not have been paid.⁸

WHEREFORE, this Board Member reverses the October 11, 2007, Supplemental Preliminary Decision and finds that for preliminary hearing purposes claimant is entitled to receive medical benefits for treatment of his low back and, if appropriate, temporary total disability benefits.

IT IS SO ORDERED.

Dated this ____ day of November, 2007.

BOARD MEMBER

c: Philip R. Carson, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Fund
Robert H. Foerschler, Administrative Law Judge

⁸ K.S.A. 44-534a(b).